

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
SPEEDUSNY.COM	)	
	)	
Request for Finding of Substantial Service for	)	File No. 0002939453
Local Multipoint Distribution Service (LMDS)	)	
Station WLT379, New York, New York	)	
	)	
Contingent Request for Waiver of Section	)	File No. 0002968483
101.1011 of the Commission's Rules or, in the	)	
Alternative, Extension of Time to Demonstrate	)	
Substantial Service for Local Multipoint	)	
Distribution Service (LMDS) Station WLT379,	)	
New York, New York	)	
	)	
IDT SPECTRUM, LLC	)	
	)	File Nos. 0002468832; 0002468846
Request for Waiver and Extension of Time of	)	
Section 101.1011 of the Commission's Rules or,	)	
in the Alternative, a Finding of Substantial Service	)	
for Local Multipoint Distribution Service (LMDS)	)	
Station WPOI485, New York, New York	)	
	)	

**MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION**

**Adopted: July 31, 2007**

**Released: July 31, 2007**

By the Chief, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. We have before us an application filed by SpeedUSNY.com, L.P. (SpeedUSNY) on March 7, 2007 seeking to demonstrate that Local Multipoint Distribution Service (LMDS) Station WLT379 is providing "substantial service" within its licensed area,<sup>1</sup> and an alternative request filed by SpeedUSNY on March 27, 2007 seeking a waiver and an extension of time to demonstrate substantial service for Station WLT379.<sup>2</sup> We also have before us an informal request filed by M2Z Networks, Inc. (M2Z) on April 9, 2007 asking the Bureau to rescind its recent grant of SpeedUSNY's renewal application, reconsider its acceptance of and dismiss SpeedUSNY's required notification of substantial service, deny

<sup>1</sup> File No. 0002939453, Section 101.1011 Report and Demonstration of Substantial Service (filed Mar. 7, 2007) (SpeedUSNY Substantial Service Showing).

<sup>2</sup> File No. 0002968483, Contingent Request for Waiver of Section 101.1011 of the Commission's Rules or, in the Alternative, Extension of Time to Construct (filed Mar. 27, 2007) (SpeedUSNY Waiver Request).

SpeedUSNY's request for extension and waiver, and automatically cancel or revoke the license.<sup>3</sup> For the reasons discussed below, we grant the M2Z Objection in part and deny it in part; deny SpeedUSNY's request for a finding that Station WLT379 is providing substantial service; grant in part SpeedUSNY's request for an extension of time to demonstrate substantial service for Station WLT379, and extend the substantial service deadline for Station WLT379 to October 6, 2008.

2. In addition, we have before us a petition, filed by IDT Spectrum, LLC (IDT Spectrum) on March 2, 2007,<sup>4</sup> seeking reconsideration of the action taken by the Broadband Division (Division) of the Wireless Telecommunications Bureau (Bureau) on January 31, 2007.<sup>5</sup> Specifically, the Division rejected IDT Spectrum's substantial service showing for LMDS Station WPOI485 and denied IDT Spectrum's request to extend the substantial service deadline for Station WPOI485 from February 1, 2006 to October 18, 2010,<sup>6</sup> but granted, on its own motion, IDT Spectrum a limited waiver to extend the substantial service deadline for Station WPOI485 to August 1, 2007.<sup>7</sup> The Division also therein authorized the processing of a renewal application for Station WPOI485, subject to the condition that the license will automatically terminate if IDT Spectrum fails to demonstrate substantial service by August 1, 2007.<sup>8</sup> For the reasons explained below, we dismiss the petition for reconsideration. However, on our own motion, we will grant IDT Spectrum a limited waiver of Section 1.946 of the Commission's Rules<sup>9</sup> to extend the substantial service deadline for Station WPOI485 to October 6, 2008.

## II. BACKGROUND

### A. The History and Evolution of LMDS

3. The 27.5-29.5 GHz (28 GHz) band has been available for point-to-point microwave radio common carrier use since 1959. However, scant interest was expressed in the use of the band prior to 1991.<sup>10</sup> In 1991, the Commission granted a waiver request filed by Hye Crest Management, Inc. (Hye Crest)<sup>11</sup> to allow the use of frequencies in the 28 GHz band for the provision of video service within the

<sup>3</sup> M2Z Networks, Inc., Request for Cancellation of SpeedUSNY.com's LMDS License and Objection to Renewal Grant, Required Notification of Substantial Service, and Contingent Waiver Request (filed Apr. 9, 2007) (M2Z Objection).

<sup>4</sup> IDT Spectrum, LLC, Petition for Reconsideration (filed Mar. 2, 2007) (IDT Spectrum Petition).

<sup>5</sup> Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, FCC, to Gregory V. Haledjian, Esq., IDT Spectrum, LLC, dated January 31, 2007 (*Division Letter*). The Division also therein acted on 103 applications that were filed by IDT Spectrum on August 30, 2006 seeking (1) waivers of 47 C.F.R. §§ 1.949(b), 101.67 to extend the license periods for 103 Fixed Service (FS) licenses in the 38.6 - 40.0 GHz band (39 GHz band) to October 18, 2010 and (2) waivers and extensions of time to comply with the substantial service requirements set-forth in 47 C.F.R. § 101.17(a) for those 103 licenses. The Petition, as filed with respect to those 103 FS licenses, will be addressed in a separate order.

<sup>6</sup> IDT filed a "Request for Waiver and Extension of Time, or in the Alternative, a Finding of Substantial Service" for Station WPOI485 on January 31, 2006. See File No. 0002468832 (filed Jan. 31, 2006) (extension of time application); File No. 0002468846 (filed Jan. 31, 2006) (renewal application) (collectively, "IDT Spectrum Waiver Request"). The applications were amended on August 30, 2006.

<sup>7</sup> See *Division Letter* at 2; Appendix B.

<sup>8</sup> See *Division Letter* at 2, 6.

<sup>9</sup> 47 C.F.R. § 1.946.

<sup>10</sup> At that time, the 28 GHz band was allocated for fixed, fixed-satellite uplinks, and mobile services. See 47 C.F.R. § 2.106. Specifically, 47 C.F.R. Part 21 permitted fixed point-to-point use, and 47 C.F.R. Part 25 allowed fixed satellite services in this band.

<sup>11</sup> See Hye Crest Management, Inc., File No. 10380-CF-P-88.

New York Standard Metropolitan Statistical Area (“SMSA”)<sup>12</sup> using a network of broad beam, omnidirectional antennas.<sup>13</sup> The Commission opted to proceed by waiver, rather than by rulemaking, in this matter because it found that the waiver approach offered the most efficient and expeditious means available for accommodating Section 7 of the Communications Act of 1934, as amended,<sup>14</sup> and allowed the introduction of a competitive communications service to New York City.<sup>15</sup> The Commission noted that no other party had demonstrated the development of technology capable of utilizing the 28 GHz band.<sup>16</sup> The Commission decided to authorize Hye Crest to provide service throughout the entire New York PMSA because it found that only a designated service area licensing scheme would provide the licensee with the necessary flexibility to select and timely establish antenna locations to facilitate efficient frequency re-use, and thereby, assure continuous signal coverage.<sup>17</sup> The Commission limited Hye Crest’s initial license term to five years because of the unique nature of High Crest’s proposed use of the 28 GHz band and because of the Commission’s concern over ensuring the efficient use of the spectrum.<sup>18</sup>

4. In the wake of the *Hye Crest MO&O*, the Commission received more than 970 applications between February 1991 and October 1992 requesting waivers similar to that granted to Hye Crest.<sup>19</sup> As a result, the former Common Carrier Bureau (CCB) implemented a freeze on the acceptance of applications for common carrier point-to-point microwave service in the 28 GHz band to preclude the filing of additional waiver applications.<sup>20</sup> The Commission subsequently dismissed those applications when it initiated a rulemaking proceeding on January 8, 1993 to amend the Commission’s Rules to reallocate the 28 GHz band and to establish rules governing LMDS.<sup>21</sup>

5. In the LMDS rulemaking proceeding, the Commission allocated 1,300 megahertz of spectrum per basic trading area (“BTA”)<sup>22</sup> for LMDS.<sup>23</sup> Specifically, the Commission allocated two LMDS

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<sup>12</sup> We note that SMSAs were eliminated by the Office of Management and Budget, effective June 30, 1993. The New York Primary Metropolitan Statistical Area (“PMSA”) is the successor to the New York SMSA.

<sup>13</sup> See *Hye Crest Management, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 332 (1991) (*Hye Crest MO&O*). The authorization permitted Hye Crest to construct a 24 channel video distribution system comprised of multiple, low power transmitters. See *id.* at ¶ 28. Each station was to provide service through transmitters within a 6 to 8 mile cell and be capable of offering discrete programming within its individual service area. See *id.* The Commission subsequently modified Hye Crest’s authorization in 1992 to permit it to operate a 49 channel system. See *Rulemaking to Amend Part 1 and Part 21 of the Commission’s Rules to Multipoint Distribution Service*, CC Docket No. 92-297, *Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 8 FCC Rcd 557, 558 ¶ 6 (1993) (*First LMDS NPRM*).

<sup>14</sup> 47 U.S.C. § 157.

<sup>15</sup> See *Hye Crest MO&O*, 6 FCC Rcd at ¶18.

<sup>16</sup> *Id.* at ¶ 22. Moreover, the Commission found that the 28 GHz band offered Hye Crest sufficient contiguous spectrum to support its proposed service. See *id.* at ¶ 21.

<sup>17</sup> *Id.* ¶ 27. The Commission authorized Hye Crest to provide service on 1 GHz of contiguous spectrum at 27.5-28.5 GHz.

<sup>18</sup> *Hye Crest MO&O*, at 335 ¶ 29.

<sup>19</sup> See *First LMDS NPRM*.

<sup>20</sup> See *Petitions for Redesignation of the Common Carrier Point-to-Point Microwave Radio Service Frequency Band 27.5-29.5 GHz*, *Order*, 7 FCC Rcd 7201 (CCB 1992).

<sup>21</sup> See *First LMDS NPRM*, 8 FCC Rcd at 564-565 ¶ 51.

<sup>22</sup> See *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services*, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12605 ¶ 136 (1997)

(continued....)

licenses per BTA – the “A Block” and “B Block” licenses.<sup>24</sup> The A Block license is comprised of 1,150 MHz of total bandwidth, and the B Block license is comprised of 150 MHz of total bandwidth.<sup>25</sup> The A Block consists of the sub bands 27.50-28.35 GHz (the A1 Band); 29.10-29.25 GHz (the A2 Band); and 31.075-31.225 GHz (the A3 Band).<sup>26</sup> The B Block consists of the sub bands 31.00-31.075 (the B1 Band) and 31.225-31.30 GHz (the B2 Band).<sup>27</sup> The same entity may hold the licenses for both the A and B Blocks of spectrum in an individual BTA, but each license is auctioned and licensed separately.

6. However, the LMDS band plan adopted by the Commission<sup>28</sup> differed significantly from the 1 GHz of unencumbered spectrum granted to Hye Crest in 1991 to provide service in the New York PMSA.<sup>29</sup> Therefore, the Commission grandfathered CellularVision (the successor-in-interest to Hye Crest)<sup>30</sup> to allow it to continue operating in the 1 GHz of contiguous spectrum at 27.5-28.5 GHz until the later date of either July 22, 1998 or the launch of the first Geostationary Orbit/Fixed Satellite Service (“GSO/FSS”) satellite licensed to operate in the spectrum.<sup>31</sup> At that time, CellularVision would be required to vacate the 150 MHz of spectrum at 28.35-28.5 GHz and transition to the use of the 150 MHz of spectrum at 29.1-29.25 GHz.<sup>32</sup> Subsequently, in the *Second LMDS Report and Order*, the Commission designated an additional 300 MHz of LMDS spectrum at 31.0-31.3 GHz, including 150 MHz of

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(*Second LMDS Report and Order*); see also Rand McNally Commercial Atlas & Marketing Guide 36-39 (123rd ed. 1992). Rand McNally is the copyright owner of the Major Trading Area (MTA) and BTA Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally’s Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally’s Commercial Atlas & Marketing Guide. The conditional use of Rand McNally copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994 and covers use by LMDS applicants. This agreement requires authorized users of the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally ownership.

<sup>23</sup> The final LMDS band allocation was adopted on March 20, 1997. See *id.* at 12556 ¶ 13; see also Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 19005, 19025 ¶ 45 (1996) (*First LMDS Report and Order*) (allocating the initial 1 GHz of spectrum for LMDS and seeking comment on the allocation of an additional 300 MHz of spectrum at 31.0-31.3 GHz). The Commission licensed the LMDS spectrum (27.5-28.35 GHz, 29.1-29.25 GHz, and 31.0-31.3 GHz) according to 493 BTAs for a total of 1,300 GHz of spectrum per BTA.

<sup>24</sup> See *Second LMDS Report and Order*, 12 FCC Rcd at 12556 ¶ 12.

<sup>25</sup> See *id.*

<sup>26</sup> See 47 C.F.R. § 101.1005.

<sup>27</sup> See 47 C.F.R. § 101.1005.

<sup>28</sup> See *Second LMDS Report and Order*, 12 FCC Rcd at 12556 ¶ 13; *First LMDS Report and Order*, 11 FCC Rcd 19025 ¶ 45.

<sup>29</sup> As noted above, the original license had been granted for a term of five years. A timely renewal application was filed for the license on December 29, 1995. See File No. 9701842 (filed Dec. 29, 1995).

<sup>30</sup> On June 23, 1995, the Commission granted a *pro forma* transfer of control from Hye Crest to CellularVision, USA, Inc. (CellularVision), a newly formed corporation. See Private Wireless Division Action Taken on Application in the Point-to-Point Microwave Radio Service, *Public Notice*, 11 FCC Rcd 1261 (1995).

<sup>31</sup> See *First LMDS Report and Order*, 11 FCC Rcd at 19028-19029 ¶¶ 55-56.

<sup>32</sup> See *id.* CellularVision was permitted to use the newly allocated 150 MHz of spectrum at 29.1-29.5 GHz during the grandfathered transition period. See *id.* However, CellularVision was limited to using the 150 MHz of spectrum at 29.1-29.5 GHz for hub-to-subscriber transmissions. See *id.*

additional A Block spectrum at 31.075-31.125 GHz.<sup>33</sup> Therefore, when the Commission granted CellularVision's renewal application on September 23, 1997,<sup>34</sup> it was authorized, pending final outcome of the rulemaking proceeding and subject to the conditions noted above, to operate in the 27.50-28.35, 28.35-28.50, 29.10-29.25 and 31.075-31.225 GHz bands for a total of 1,300 MHz.<sup>35</sup> The license, under the call sign WLT379, was renewed for a ten-year term with an expiration date of February 1, 2006.

7. CellularVision subsequently disaggregated and assigned two segments of its original A Block of LMDS spectrum. Specifically, CellularVision entered into an agreement with WinStar Wireless Fiber Corp., a fully owned subsidiary of WinStar Communications, Inc., for the assignment, by disaggregation, and sale of 850 MHz of spectrum at 27.50-28.35 GHz (*i.e.*, the A1 Band).<sup>36</sup> The Commission assigned the call sign WPOI485 to the disaggregated spectrum (*i.e.*, the A1 Band) assigned to WinStar Wireless Fiber Corp. Thereafter, CellularVision, now renamed SpeedUSNY.com, L.P. (SpeedUSNY),<sup>37</sup> sought to disaggregate and assign the 150 MHz of LMDS spectrum that comprised the A Block of spectrum at 31.075-31.225 GHz (*i.e.*, the A3 Band) to NextLink Communications, Inc. (NextLink Communications).<sup>38</sup> The Commission assigned call sign WPOL286 to the disaggregated spectrum (*i.e.*, the A3 Band) assigned to NextLink Communications. Consequently, as a result of the disaggregations, three licensees – WinStar Wireless Fiber Corp., SpeedUSNY, and NextLink Communications – each held a portion of the A Block of LMDS spectrum originally granted to CellularVision for the New York PMSA.<sup>39</sup> As such, these three licenses are the only LMDS authorizations that were not subject to or won by auction.

#### **B. Nextlink Wireless, Inc. Request**

8. Nextlink Wireless, Inc. (Nextlink Wireless) is the licensee of 91 LMDS licenses, three of which are in the New York BTA. Specifically, within the New York BTA, Nextlink Wireless is the licensee of LMDS Stations WPOL286,<sup>40</sup> WPOH942,<sup>41</sup> and WPLM397.<sup>42</sup> On January 12, 2005, Nextlink

<sup>33</sup> See *Second LMDS Report and Order*, 12 FCC Rcd at 12565 ¶ 36.

<sup>34</sup> See License for LMDS Station WLT379, File No. 9701842 (granted Sept. 23, 1997); see also Wireless Telecommunications Bureau Application Accepted for Filing, *Public Notice*, Report 97-29 (rel. July 1, 1997).

<sup>35</sup> However, at the conclusion of the grandfathered period, CellularVision was required to cease operating at 28.35-28.50 GHz, thus transitioning CellularVision to the uniform allocation of 1,150 MHz of A Block spectrum at 27.5-28.35, 29.1-29.25 and 31.075-31.225 GHz.

<sup>36</sup> See File No. 0000002138 (filed Aug. 25, 1998); see also Agreement to Assign LMDS License (dated, effective, as of July 10, 1998). The Commission consented to the transaction on October 9, 1998. The transaction was consummated on the same date. See Report No. 2010, *Public Notice* (rel. Oct. 14, 1998).

<sup>37</sup> See File No. 0000005778 (filed Feb. 12, 1999; granted Mar. 9, 1999).

<sup>38</sup> See File No. 0000016529 (filed July 9, 1999); see also Amended Agreement to Assign LMDS License (dated, effective, as of June 13, 1999). The Commission consented to the transaction on August 30, 1999. Consummation of the transaction occurred on October 12, 1999.

<sup>39</sup> Specifically, the A1, A2, and A3 Bands were licensed to WinStar Wireless Fiber Corp, SpeedUSNY, and NextLink Communications, respectively. The license held by SpeedUSNY retained the original call sign of WLT379. However, each license now shared the common expiration of the original license – February 1, 2006. See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, *Fourth Report and Order*, 13 FCC Rcd 11655, 11668 ¶ 22 (1998).

<sup>40</sup> As noted above, in 1999, SpeedUSNY disaggregated and assigned spectrum under call sign WPOL286, the A3 Band of the LMDS spectrum in eight of the 26 counties in the New York BTA, to Nextlink Communications. The license for Station WPOL286 retained the expiration date of the original license, still held by SpeedUSNY under call sign WLT379, of February 1, 2006. However, when the license for Station WPOL286 was first issued to

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Wireless, then operating as XO Communications, Inc. (XO), filed a request for waiver of Section 101.1011 of the Commission's Rules<sup>43</sup> to permit additional time to demonstrate substantial service for LMDS Station WPOL286.<sup>44</sup> Specifically, Nextlink Wireless requested that the Commission extend the construction deadline for Station WPOL286 from March 27, 2007 to October 6, 2008 to correct an historical anomaly in the licensing of the New York BTA that effectively imposed a unique burden on it as the licensee of two A Block licenses which, taken together, provide coverage across the entire New York BTA.<sup>45</sup> The A Block of the New York BTA is the only block of LMDS spectrum within a BTA that does not have a uniform construction and expiration date because part of the A Block was granted by waiver and the remainder of the A Block was subject to auction. As a result, the New York BTA is the only BTA where an LMDS licensee of A Block spectrum may be exposed to divergent deadlines to construct facilities and provide substantial service for more than one station within the same block of LMDS spectrum (*i.e.*, the "A Block"). Nextlink Wireless argued that, absent a waiver, it would be required to provide substantial service to eight of the counties of the New York BTA that are within the coverage of area of Station WPOL286 by March 27, 2007, even though it would not be required to provide substantial service to the eighteen counties of the New York BTA that are within the coverage area of Station WPOH942 until October 6, 2008.<sup>46</sup> On August 21, 2006, the request was granted through the Bureau's Universal Licensing System (ULS), thereby extending the substantial service deadline for Station WPOL286 by 18 months to October 6, 2008.<sup>47</sup>

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Nextlink Communications, the Commission imposed a construction and substantial service deadline of March 27, 2007.

<sup>41</sup> The license for Station WPOH942 includes 1,150 MHz of A Block spectrum (*i.e.*, the A1, A2, and A3 bands) across 18 of the remaining 26 counties in the New York BTA that had not been previously granted, by waiver, to Hye Crest in 1991. WNP Communications, Inc. (WNP) was the winning bidder for this spectrum in Auction 17. *See* LMDS Auction Closes, *Public Notice*, 13 FCC Rcd 18217 (1998) (*Auction 17 Closing PN*). The Commission granted WNP's license application on October 6, 1998. *See* File No. 0000000091. A license was printed and mailed to WNP on November 20, 1998 under call-sign WPOH942 with a construction and substantial service deadline of October 6, 2008. On January 21, 1999, WNP filed an application to assign WPOH942 to PCO Acquisition Corp. (PCO), a wholly-owned subsidiary of NextLink Communications. *See* File No. 0000003365. The Commission consented on March 30, 1999, and the transaction was consummated on April 26, 1999.

<sup>42</sup> The license for Station WPLM397 authorizes the use of the entire 150 MHz of B Block spectrum (31.00-31.075; 31.225-31.30 GHz) that extends coverage across all 26 counties of the New York BTA. NEXTBAND Communications, LLC (NEXTBAND) was the winning bidders of the B Block license in Auction 17. *See Auction 17 Closing PN*, Attachment A. The Commission granted NEXTBAND's application on June 17, 1998 and issued a license on September 2, 1998 under call-sign WPLM397 with a construction and substantial service deadline of June 17, 2008. *See* File No. 0000000114. Nextel Spectrum Acquisition Corp. and NextLink Communications jointly owned NEXTBAND until the parties consummated a *pro forma* transfer of control and sale of NEXTBAND to NextLink Communications on June 3, 1999. *See* File No. 0000016229.

<sup>43</sup> 47 C.F.R. § 101.1011.

<sup>44</sup> XO Communications, Inc., Request for Rule Waiver and Extension of Construction Deadline, File No. 0002004326 (Jan. 12, 2005). XO filed an administrative updated on April 20, 2006 to change its name to Nextlink Wireless, Inc. (Nextlink Wireless). *See, e.g.*, File No. 0002578660 (filed Apr. 20, 2006). To avoid confusion, we herein refer to the waiver request filed on January 12, 2005 as the Nextlink Wireless Waiver Request.

<sup>45</sup> Nextlink Wireless Waiver Request at 1.

<sup>46</sup> Nextlink Wireless Waiver Request at 5-8.

<sup>47</sup> *See* File No. 0002004326.

### C. SpeedUSNY.com, L.P. Request

9. SpeedUSNY, formerly known as CellularVision,<sup>48</sup> holds the license for LMDS Station WLT379, which operates in the A2 Band (29.10-29.25 GHz) across eight of the 26 counties in the New York BTA. Although the expiration date for the license was February 1, 2006, the construction and substantial service deadline for Station WLT379 was March 27, 2007. An application for renewal was filed by SpeedUSNY on January 9, 2006 and was granted through ULS on February 6, 2006.<sup>49</sup> The renewal application did not include a substantial service showing because the construction and substantial service deadline for Station WLT379 was March 27, 2007. On March 7, 2007, SpeedUSNY filed a substantial service showing,<sup>50</sup> and on March 27, 2007, SpeedUSNY filed an alternative request for waiver of Section 101.1011 of the Commission's Rules<sup>51</sup> and for an extension of time.<sup>52</sup>

10. In its substantial service showing, SpeedUSNY contends that it has provided substantial service within the New York BTA during its ten year license term, which was from 1996 to 2006.<sup>53</sup> Specifically, SpeedUSNY contends that it used 15 base stations to provide hub-to-subscriber video services on 49 channels to approximately 18,000 household and business subscribers from 1996 to 1998.<sup>54</sup> The service, which actually began in 1992 and continued into the current license term, was terminated in 1998 for financial reasons.<sup>55</sup> SpeedUSNY argues that this service covered 52 percent of the population in its licensed market and therefore falls within one of the Commission's safe-harbors.<sup>56</sup> SpeedUSNY also states that it offered financial institutions throughout its licensed area Bloomberg Information Television programming from 1996 to 2000.<sup>57</sup> SpeedUSNY contends that it thereby rendered substantial service by serving a "niche market" in its licensed area.<sup>58</sup> In addition, SpeedUSNY notes that it conducted a pilot program that delivered high-speed broadband internet access via 14 internet broadcast stations "to portions" of its licensed area from 1996 to 2003.<sup>59</sup> SpeedUSNY suspended the pilot program in 2003 "due to the lack of equipment on an economically rational basis."<sup>60</sup> Lastly, SpeedUSNY contends that, in 2004, it entered into an agreement with XO whereby XO would utilize Station WLT379's frequencies "to test various technical applications."<sup>61</sup> According to SpeedUSNY, its current plans are to "build upon the lessons of its pilot program and provide . . . [broadband super high-speed

<sup>48</sup> See File No. 0000005778 (filed Feb. 12, 1999; granted Mar. 9, 1999).

<sup>49</sup> See File No. 0002439954 (renewal only).

<sup>50</sup> SpeedUSNY Substantial Service Showing.

<sup>51</sup> 47 C.F.R. § 101.1011.

<sup>52</sup> SpeedUSNY Waiver Request.

<sup>53</sup> See SpeedUSNY Substantial Service Showing at 1-4.

<sup>54</sup> *Id.* at 1-2.

<sup>55</sup> See, e.g., *id.* at 2. SpeedUSNY also attached an engineering statement, dated and signed March 7, 2007, that states, in the present tense, that the "SpeedUSNY LMDS system is comprised of fifteen (15) transmit sites. . . ." See *id.*, Engineering Statement of T. Lauriston Hardin, P.E. (dated Mar. 7, 2007). Therefore, it is unclear whether the 15 transmit sites were dismantled after the termination of service.

<sup>56</sup> See SpeedUSNY Substantial Service Showing at 2.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* SpeedUSNY determined that, based "on technology innovation activities," there may be better and more spectrally-efficient uses for LMDS spectrum, and concentrated on developing broadband services." *Id.* at 3.

<sup>59</sup> See *id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Internet service] throughout its licensed area within the next three years.”<sup>62</sup> To date, SpeedUSNY estimates that it has expended \$70 million to construct and operate Station WLT379.<sup>63</sup> SpeedUSNY is continuing to invest funds in technology development and business planning.<sup>64</sup>

11. In its alternative request for waiver and for extension of time, SpeedUSNY states that it intends to provide broadband throughout its licensed area within the next three years and estimates that “economically viable equipment will be available within the next 18 months.”<sup>65</sup> Therefore, SpeedUSNY contends that a waiver is warranted due to the presence of unique facts that render application of the substantial service deadline in this instance inequitable and unduly burdensome.<sup>66</sup> Specifically, SpeedUSNY argues that it has exercised “diligence in constructing facilities and providing significant levels of service before and during its license term.”<sup>67</sup> According to SpeedUSNY, it “took steps to discontinue uneconomical services, instead directing resources towards new technologies and services. SpeedUSNY suspended the provision of its pilot program for high-speed broadband due in part to the unavailability of equipment at economically rational costs.”<sup>68</sup> SpeedUSNY contends that “[e]quipment unavailability has been a significant issue in the industry and has stifled the deployment of competitive services.”<sup>69</sup> It seeks an additional three years from March 27, 2007 to demonstrate substantial service.

12. On April 9, 2007, M2Z filed an informal request, pursuant to Section 1.41 of the Commission’s Rules,<sup>70</sup> that the Bureau rescind its recent grant of SpeedUSNY’s renewal application, reconsider its acceptance of and dismiss SpeedUSNY’s required notification of substantial service, deny SpeedUSNY’s request for extension and waiver, and automatically cancel or revoke the license.<sup>71</sup> M2Z contends that “[n]otably absent from Speedus’s report is any discussion of actual LMDS services currently being offered by Speedus to its New York City market.”<sup>72</sup> M2Z notes that, aside from whether the offerings described by SpeedUSNY would demonstrate the provision of substantial service in the New York BTA if they were furnished on an ongoing basis, “the level of service described in the company’s report fails on its face to meet the FCC’s substantial service standard. . . [because] FCC rules require LMDS licensees to show that they *are providing* substantial service.”<sup>73</sup> M2Z also disputes

<sup>62</sup> *Id.* at 3. However, “[a]s an initial focus, within the next 12 months, SpeedUSNY plans to continue its technology development efforts and its discussions with companies that can manufacture equipment at a price point that will make it attractive for consumers. . . . SpeedUSNY believes that it can deploy broadband services within the next 12 months.” *Id.* at 4.

<sup>63</sup> *Id.* at 4. Specifically, \$25 million in system construction; \$25 million in operating expenses; \$7.5 million in technology development and research; \$7.5 million in business planning; and \$5 million in legal fees. *See id.*

<sup>64</sup> *Id.* at 4.

<sup>65</sup> SpeedUSNY Waiver Request at 2-3.

<sup>66</sup> *See id.* at 3-4. SpeedUSNY also argues that relief is warranted pursuant to 47 C.F.R. § 1.946(e) because the “equipment difficulties here were beyond the control of SpeedUSNY and could not have been reasonably anticipated.” *Id.* at 6. We also note that SpeedUSNY committed to “continue its efforts while this request remains pending, despite the risks inherent in such activities.” *Id.*

<sup>67</sup> *Id.* at 3.

<sup>68</sup> *Id.* at 3.

<sup>69</sup> *Id.* at 4.

<sup>70</sup> 47 C.F.R. § 1.41.

<sup>71</sup> *See* M2Z Objection. M2Z has filed an application for a license to provide internet access in the 2155-2175 MHz band. *See* Application of M2Z Networks, Inc. for License and Authority to Provide a National Broadband Radio Service in the 2155-2175 MHz Band (filed May 5, 2006; amended Sept. 6, 2006) (M2Z Application).

<sup>72</sup> M2Z Objection at 7.

<sup>73</sup> M2Z Objection at 8 (emphasis in original).



SpeedUSNY's various contentions regarding the unavailability of equipment and SpeedUSNY's ability to finance the construction and deployment of equipment in a timely manner.<sup>74</sup> Accordingly, M2Z contends that "[e]nforcing the automatic cancellation provision of Speedus's license will open the LMDS market to a new, more dynamic provider willing to invest the capital needed to revitalize this spectrum."<sup>75</sup>

#### **D. IDT Spectrum Licensing, Inc. Petition for Reconsideration**

13. IDT Spectrum, a fully owned subsidiary of IDT Corporation, is the licensee of 15 LMDS stations, including LMDS Station WPOI485, which is authorized to operate in A1 Band (27.50-28.35 GHz) across eight of the 26 counties in the New York BTA. The authorization to operate in the A1 Band for those eight counties was originally held by CellularVision under the call-sign WLT379 prior to the assignment, by disaggregation, of the 850 MHz of spectrum to WinStar Wireless Fiber Corp.<sup>76</sup> The Commission assigned call-sign WPOI485 to the disaggregated spectrum (*i.e.*, the A1 Band) assigned to WinStar Wireless Fiber Corp. and issued a license with an expiration date and construction deadline of February 1, 2006. The license for Station WPOI485 was subsequently acquired in 2001 by IDT Corporation, via its subsidiaries, from the bankrupt estate of WinStar Communications, including its subsidiaries WinStar Wireless Fiber Corp. and WinStar LMDS, LLC, and is currently held by IDT Spectrum.<sup>77</sup>

14. On January 31, 2006, IDT Spectrum filed two applications for LMDS Station WPOI485 – one seeking renewal and one seeking a two-year extension of time (and related waiver of the Commission's Rules) to demonstrate substantial service.<sup>78</sup> On August 30, 2006, IDT Spectrum amended its applications to request that the Commission extend its substantial service deadline for Station

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<sup>74</sup> M2Z Objection at 9-12. For example, M2Z states that SpeedUSNY noted, in an annual report filed with the Securities and Exchange Commission on December 31, 2006, that "[w]e will not commence a full marketing effort using our LMDS technology until new LMDS equipment becomes commercially available with cost and performance that allow implementation of an economically viable business model. *We cannot determine when this will occur and this equipment may never be available to us on this basis.*" M2Z Objection at 10 (*quoting* Speedus Corp., Securities and Exchange Commission Form 10-K, Annual Report for the fiscal year ended December 31, 2006 at 4, 15) (emphasis provided by M2Z). In addition, M2Z notes that the engineering statement provided by SpeedUSNY with its substantial service showing indicates that "Speedus has equipment, but simply is not using that equipment to provide any service because it doesn't fit Speedus's current business plan." M2Z Objection at 12.

<sup>75</sup> M2Z Objection at 10-11.

<sup>76</sup> See File No. 0000002138 (filed Aug. 25, 1998); *see also* Agreement to Assign LMDS License (dated, effective, as of July 10, 1998). The Commission consented to the transaction on October 9, 1998. The transaction was consummated on the same date. See Report No. 2010, *Public Notice* (rel. Oct. 14, 1998). WinStar LMDS, LLC, another subsidiary of WinStar Communications, was the successful high bidder for the 14 other LMDS licenses, in Auction 17, which concluded on March 25, 1998. See *Auction No. 17 Closing PN*.

<sup>77</sup> See IDT Spectrum, LLC, Petition for Reconsideration (filed Mar. 2, 2007) (IDT Spectrum PFR).

<sup>78</sup> See File No. 0002468832 (filed Jan. 31, 2006) (extension of time application); File No. 0002468846 (filed Jan. 31, 2006) (renewal application) (collectively, "IDT Spectrum Waiver Request"). The applications were amended on August 30, 2006. However, by letter, dated July 31, 2006, IDT Spectrum explained to the Commission that, since January 31, 2006, it has found it necessary to limit its ongoing expenditures and to engage in an extensive restructuring of its business. See File No. 0002468832, Letter from Gregory V. Haledjion, Esq., Counsel, IDT Spectrum, LLC, to Marlene H. Dortch, Secretary, FCC (July 31, 2006). In particular, IDT Spectrum notes that "most of the senior executives and staff pursuing the operational plans described in the applications have left the company" since June. *Id.* Moreover, IDT Spectrum explains that its parent company "has suspended most investment in the business model described in the original waiver request pending clarification concerning renewal of its fixed service licenses." *Id.*

WPOI485 by more than 56 months – from February 1, 2006 to October 18, 2010.<sup>79</sup> On January 31, 2007, the Division found that IDT Spectrum failed to demonstrate that Station WPOI485 is providing substantial service in the New York BTA.<sup>80</sup> In addition, the Division also found that IDT Spectrum's arguments failed to justify an extension of time to demonstrate substantial service for Station WPOI485.<sup>81</sup> Although the Division found that IDT Spectrum had failed to demonstrate that the requested waiver was warranted, the Division, on its own motion, granted IDT Spectrum a limited waiver of Section 1.946 of the Commission's Rules<sup>82</sup> to extend the substantial service deadline for Station WPOI485 from February 1, 2006 to August 1, 2007.<sup>83</sup> The Division also therein authorized the processing of a renewal application for Station WPOI485, subject to the condition that the license will automatically terminate if IDT Spectrum fails to demonstrate substantial service by August 1, 2007.<sup>84</sup> On March 2, 2007, IDT Spectrum filed a petition seeking reconsideration of the action taken by Division.

### III. DISCUSSION

15. LMDS licensees may provide any service consistent with the Commission's Rules and their regulatory status,<sup>85</sup> subject to a ten-year term from the initial license grant date.<sup>86</sup> At the end of the ten year period, licensees are required to submit an acceptable showing to the Commission demonstrating that they are providing "substantial service" to their service area.<sup>87</sup> The Commission defined "substantial service" as "service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal."<sup>88</sup> In adopting a substantial service requirement for LMDS licensees, the Commission concluded that such a requirement would provide licensees with the flexibility to offer a range of services using the spectrum while promoting efficient use of the spectrum, encouraging the provision of service to rural, remote, and insular areas, and preventing the warehousing of spectrum.<sup>89</sup>

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<sup>79</sup> See File No. 0002468832, Letter from Gregory V. Haledjian, Esq., Counsel, IDT Spectrum, LLC, to Marlene H. Dortch, Secretary, FCC, (dated Aug. 30, 2006).

<sup>80</sup> See *Division Letter* at 4. Specifically, the Division found "nothing in the record to support a finding that Station WPOI485 has provided substantial service, or any service, to the New York BTA." *Division Letter* at 4. The Division noted that "IDT concedes that it has no 'active operations specifically using its LMDS frequencies in the New York City service area for Call Sign WPOI485.'" *Division Letter* at 4 (quoting IDT Spectrum Waiver Request at 9). Moreover, the Division emphasized that "IDT has now admitted that it has abandoned the efforts that formed the basis for its substantial service showing." *Division Letter* at 4.

<sup>81</sup> See *Division Letter* at 4.

<sup>82</sup> 47 C.F.R. § 1.946.

<sup>83</sup> See *Division Letter* at 2; Appendix B. Specifically, the Division found that such a limited waiver would further the public interest "by preventing the disruption of any service that IDT may currently be providing while giving IDT a last opportunity to put these licenses to use." *Division Letter* at 6.

<sup>84</sup> See *Division Letter* at 2, 6.

<sup>85</sup> See 47 C.F.R. § 101.1013(b).

<sup>86</sup> See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259. Pursuant to 47 C.F.R. § 101.67, LMDS licenses are issued for a period not to exceed ten years.

<sup>87</sup> See 47 C.F.R. § 101.1011(a); see also *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶¶ 261-262.

<sup>88</sup> *Id.* at 12658 ¶ 261; see also *id.* 12660 ¶ 269. The Commission elaborated on what may constitute "substantial service" for LMDS by offering some specific examples, which are sometimes referred to as "safe-harbors." See *id.* at 12660-12661 ¶¶ 269-270.

<sup>89</sup> See *id.* at 12659 ¶ 266.

Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.<sup>90</sup>

16. Section 1.946 of the Commission's Rules provides that a request for extension of time to construct "may be granted if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."<sup>91</sup> The rule prohibits granting extensions based on a failure to obtain financing, failure to obtain an antenna site, failure to order equipment, or because of a transfer of control of the licensee.<sup>92</sup> Section 1.925 of the Commission's Rules<sup>93</sup> provides that a waiver of the Commission's Rules may be granted if it is shown that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>94</sup>

#### A. SpeedUSNY.com, Inc. Request

17. We find that SpeedUSNY has not demonstrated that LMDS Station WLT379 is providing substantial service within the New York BTA. We decline to make a finding of substantial service where the licensee is not currently providing service within the licensed area.<sup>95</sup> As M2Z notes, "[n]otably absent from Speedus's report is any discussion of actual LMDS services currently being offered by Speedus to its New York City market."<sup>96</sup> SpeedUSNY's reliance on *Biztel* is misplaced.<sup>97</sup> In *Biztel*, a 39 GHz licensee constructed at least four links per million population in each licensed area during the license term to provide a variety of services to customers, including wireless local loop service, backhaul, and backbone service for wireless service providers.<sup>98</sup> Although Biztel was utilizing these links to provide service to the public, it explained that all the paths were not operational simultaneously for the entire license period because the type of service it provided was dynamic rather than stable.<sup>99</sup> In contrast to *Biztel*, where the licensee was providing service, albeit a service that was dynamic, SpeedUSNY ceased providing video services in 1998 and Bloomberg Informational Television programming in 2000, and

<sup>90</sup> See 47 C.F.R. § 101.1011(a).

<sup>91</sup> 47 C.F.R. § 1.946(e)(1).

<sup>92</sup> 47 C.F.R. § 1.946(e)(2), (3).

<sup>93</sup> 47 C.F.R. § 1.925.

<sup>94</sup> *Id.*; see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

<sup>95</sup> See 47 C.F.R. § 101.1011(a); *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶¶ 261-262; *id.* at 12660 ¶ 269 ("At the 10-year period, we will require all LMDS licensees to submit an acceptable showing to the Commission demonstrating that they are providing substantial service.").

<sup>96</sup> M2Z Objection at 7.

<sup>97</sup> SpeedUSNY Request at 5 (*citing* In the Matter of Applications of Biztel, Inc. for Renewal of 39 GHz Licenses for Stations WMT884, Omaha, Nebraska and WPJA898, San Juan, Puerto Rico, *Memorandum Opinion and Order*, 18 FCC Rcd 3308 (WTB PSPWD 2003) (*Biztel*)).

<sup>98</sup> See *Biztel*, 18 FCC Rcd at 3310-3311 ¶¶ 6-8.

<sup>99</sup> See *id.* Accordingly, the former Public Safety and Private Wireless Division of the Bureau concluded that, based on the record, Biztel demonstrated the provision of substantial service in the licensed areas even though it did not fall within one of the safe-harbors. See *id.* at 3311 ¶ 8.

terminated its broadband pilot program in 2003.<sup>100</sup> Accordingly, we cannot find that, based on the record, SpeedUSNY has demonstrated the provision of substantial service within the New York BTA. Therefore, to the extent that M2Z asks that we deny the substantial service showing for WLT379, we grant the informal request.

18. We conclude, however, that SpeedUSNY has justified a partial grant of its application for extension of time to demonstrate substantial service. We disagree with M2Z's contention that SpeedUSNY has been warehousing spectrum.<sup>101</sup> Although SpeedUSNY has failed to demonstrate substantial service, its past operations do demonstrate that it has diligently tried various means of using the station to provide service. Furthermore, these efforts are continuing, and SpeedUSNY has access to building sites in the New York area. On balance, we believe that SpeedUSNY has demonstrated sufficient diligence to justify an extension of time.<sup>102</sup>

19. We do not believe, however, that SpeedUSNY has justified its request for a three-year extension of time to demonstrate substantial service for Station WLT379. We agree with M2Z that the record in this proceeding does not demonstrate that SpeedUSNY faces the extensive technical and equipment challenges experienced by licensees in the Wireless Communications Service (WCS) that warranted a three-year extension of time in the *WCS Extension Order*.<sup>103</sup> In the *WCS Extension Order*, the Bureau found limited deployment attempts using available equipment had been marred by technical problems or proved to be economically infeasible.<sup>104</sup> Moreover, the Bureau was "persuaded . . . that relatively restrictive [out-of-band emission (OOBE)] limits may have impeded the development of WCS equipment and have contributed to the unique circumstances of the band."<sup>105</sup> The circumstances presented by SpeedUSNY are distinguishable from those cases where the Commission granted extensions of time or waivers in services where the "innovative" technology had not yet become available.<sup>106</sup> Furthermore, SpeedUSNY "expects that economically viable equipment will be available within the next 18 months."<sup>107</sup> We also note that in contrast Nextlink Wireless, another A Block licensee in the New

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<sup>100</sup> See Substantial Service Showing at 2-3. SpeedUSNY also notes that it entered into an agreement with XO in 2004 to allow XO to use the spectrum to test applications. See *id.* at 3.

<sup>101</sup> M2Z Objection at 7-9.

<sup>102</sup> See Leap Wireless International, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 19573, 19575 ¶ 7 (WTB CWD 2001) (demonstration of diligence in attempting to construct facilities is justification for extension of time to demonstrate substantial service).

<sup>103</sup> Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (WTB 2006) (*WCS Extension Order*).

<sup>104</sup> See *WCS Extension Order*, 21 FCC Rcd at 14139 ¶ 10.

<sup>105</sup> See *WCS Extension Order*, 21 FCC Rcd at 14139 ¶ 10.

<sup>106</sup> See *WCS Extension Order*, 21 FCC Rcd at 14137-14141 ¶¶ 7-11 (discussed above); Request of Warren C. Havens for Waiver of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994 (WTB 2004) (widespread equipment availability difficulties facing licensees and confining technical characteristics warranted granting an extension of time to all licensees because the two companies that originally manufactured equipment no longer did so and because the loss of that equipment was a unique circumstance that frustrated licensees' efforts to meet the construction requirements); FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (WTB 2001) (granting limited extension to all 900 MHz Specialized Mobile Radio (SMR) licensees because the record demonstrated that there was no 900 MHz SMR digital voice equipment available in the near-term); Maritel, Inc., *Order*, 18 FCC Rcd 24670 (WTB PSPWD 2003) (extension granted to licensee seeking to develop a maritime data network using an innovative data technology that is specifically geared toward the maritime community).

<sup>107</sup> SpeedUSNY Waiver Request at 3.

York BTA, only requested an extension from March 27, 2007 to October 6, 2008 to demonstrate substantial service for LMDS Station WPOL286 in the A3 Band.

20. On balance, we believe the public interest would best be served by granting SpeedUSNY an extension until October 6, 2008 to demonstrate substantial service. We believe there is good cause to harmonize the construction and substantial service deadlines for those licenses that comprise the A Block of LMDS spectrum in the New York BTA. Because the A Block spectrum of the twenty-six county New York BTA was bifurcated – with part (comprising eight of the twenty-six counties) licensed pursuant to a waiver dating back to 1991 and with part (comprising the remaining eighteen counties) subject to auction, it is the only BTA where there will be a fragmented roll-out of LMDS services.<sup>108</sup> By harmonizing the construction and substantial service deadlines for the A Block licenses in the New York BTA, we are removing a regulatory fragmentation in the New York BTA that distinguishes it from all other LMDS BTAs. Such an approach is consistent with our earlier decision to grant the same extension to Nextlink.<sup>109</sup> Nextlink held two A Block licenses, Stations WPOL286 (A3 Band in eight of the 26 counties) and WPOH942 (A1, A2, and A3 Bands in the remaining 18 counties),<sup>110</sup> which taken together provide coverage across the entire New York BTA. Nextlink sought, and received, an extension of the construction deadline from March 27, 2007 to October 6, 2008 because it faced the specter of divergent construction deadlines: absent a waiver, Nextlink was required to provide substantial service to eight of the 26 counties in the New York BTA by March 27, 2007, even though it would not be required to provide substantial service to the remaining 18 counties until October 6, 2008. Our action is also consistent with the Commission's intent in adopting BTAs as the geographic areas for licensing LMDS. By relying on BTAs, the Commission sought to create a more level competitive playing field, avoid fragmenting natural telecommunications markets, and offer licensees the flexibility to define service markets.<sup>111</sup> Accordingly, we find that it would be reasonable under the circumstances and would further the public interest to grant SpeedUSNY a limited waiver of Section 1.946 of the Commission's Rules<sup>112</sup> to extend the construction and substantial service deadline for LMDS Station WLT379 from March 27, 2007 to October 6, 2008. Failure by SpeedUSNY to demonstrate that Station WLT379 is providing substantial service within its licensed area prior to October 6, 2008 will result in the automatic termination of the license.

21. We find that the licensee's actions in the instant case are distinguishable from the actions taken by licensees in those cases cited by M2Z for the principle that "licensees cannot obtain relief from buildout requirements if their failure to achieve substantial service flows from ill-fated business decisions."<sup>113</sup> For example, in the *ITV* case cited by M2Z,<sup>114</sup> the Bureau's Mobility Division denied a

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<sup>108</sup> With the exception of the New York BTA, the A Block spectrum of all other LMDS BTAs was available for auction in its entirety and therefore licensed to a single applicant (with a single grant date and a single construction and substantial service deadline). Moreover, any license created by disaggregation from the original A Block license would, pursuant to the Commission's disaggregation rules, retain the same common expiration date of the original license.

<sup>109</sup> See discussion *supra* at paragraph 8.

<sup>110</sup> As stated earlier, Nextlink also holds Station WPLM397 (the B1 and B2 Bands) which covers all 26 counties of the New York BTA. See *supra* note 42.

<sup>111</sup> See, e.g., *Second LMDS Report and Order*, 12 FCC Rcd at 12606 ¶¶ 135-139. The Commission has recognized that BTAs afford LMDS licensees greater economies of scale than smaller geographic service areas. See, e.g., *Second LMDS Report and Order*, 12 FCC Rcd at 12606 ¶ 138.

<sup>112</sup> 47 C.F.R. § 1.946.

<sup>113</sup> M2Z Objection at 15.



request for a waiver of the substantial service requirements applicable to licensees in the 218-219 MHz Service because the licensee failed to provide any service to the public within its licensed area during its ten year license term. In addition, the licensee was seeking a finding of substantial service or an extension of time based on the expenses incurred related to its 218-219 MHz service license including the development of a business model and equipment testing.<sup>115</sup> In the *Coran* case cited by M2Z, the failure to construct was the result of the licensee's business decisions, where the licensee was relying on a third party to finance construction of its system and "a bank error . . . precluded access to funds that were to be used to meet its construction obligations."<sup>116</sup> Finally, in two other 218-219 MHz Service cases cited by M2Z, the licensees had expended little effort toward providing service or even toward developing business plans and were effectively seeking waivers and extensions of time to sell the licenses.<sup>117</sup> In contrast to the above cases, SpeedUSNY has incurred significant expenses (\$70 million) to construct and operate Station WLT379 and put forth great efforts to develop LMDS prior to the creation of the service; has provided service within the instant license term, albeit not service of a continuing nature that would be sufficient to justify a finding of substantial service at the current date; has a business plan to provide actual service within the New York BTA; and has been continuing its efforts to provide service within the New York BTA while the instant request has been pending despite the inherent risk in such an action. Accordingly, we deny the M2Z Objection to the extent that it requests that the Commission take further action at this time.

#### **B. IDT Spectrum Licensing, Inc. Petition for Reconsideration**

22. Pursuant to Section 1.945(e) of the Commission's Rules,<sup>118</sup> the Commission "may grant applications in part, and/or subject to conditions other than those normally applied to authorizations of the same type." When the Commission takes such action, it will inform the applicant of the reasons.<sup>119</sup> Moreover, "[s]uch partial or conditional grants are final unless the FCC revises its action in response to a petition for reconsideration. Such petitions for reconsideration must be filed by the applicant within thirty days after the date of the letter or order stating the reasons for the partial or conditional grant, and must reject the partial or conditional grant and return the instrument of authorization."<sup>120</sup>

(...continued from previous page)

<sup>114</sup> M2Z Objection at 15 (*citing* Application of ITV, Inc. to Renew the License for Station KIVD0011, San-Francisco-Oakland, California, in the 218-219 MHz Service, *Memorandum Opinion and Order*, 22 FCC Rcd 1908 (WTB MD 2007) (*ITV*)).

<sup>115</sup> See Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, FCC to Buddy C. Stanley, ITV, Inc., *Letter Order*, 20 FCC Rcd 9548 (WTB MD 2005), *aff'd*, *ITV*, 22 FCC Rcd at 1911-1915 ¶¶ 6-12.

<sup>116</sup> Letter from Thomas Derenge, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, FCC, to Stephen E. Coran, Esquire, *Letter Order*, 22 FCC Rcd 1921, 1921 (WTB MD 2007); *see also id.* at 1922 (noting that a third party's failure to perform in accordance with a business agreement is not an unusual circumstance that justifies a waiver of the rules).

<sup>117</sup> See Applications of Thomas A. Seaman, Receiver for Vitech Corporation, *Order*, 22 FCC Rcd 1916 (WTB MD 2007); Letter from Thomas Derenge, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, FCC, to Rachael E. Schwartz, Joshua J. Izenberg, Baker & McKenzie, *Letter Order*, 20 FCC Rcd 12325 (WTB MD 2005). Lastly, in Panamsat License Corp., *Memorandum Opinion and Order*, 15 FCC Rcd 18720, 18723 ¶ 10 (IB 2000), the International Bureau found that "[t]he filing of a license modification application does not justify an extension of a milestone schedule because the decision to seek a modification of one's license is a business decision wholly within the discretion and control of the licensee."

<sup>118</sup> 47 C.F.R. § 1.945(e).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

23. In this case, IDT Spectrum filed a petition for reconsideration within thirty days of the Division's decision to grant IDT Spectrum an extension of the substantial service deadline for Station WPOI485 (A1 Band in eight of the 26 counties in the New York BTA) from February 1, 2006 to August 1, 2007. However, IDT Spectrum failed to reject the partial grant therein. When an applicant fails to timely reject a partial grant of its application, the applicant is deemed to have accepted the partial grant and has waived the right to contest the failure to grant the application in full.<sup>121</sup> Accordingly, we dismiss the petition for reconsideration for failure to timely reject the partial grant.

24. Although we dismiss the instant petition for reconsideration, we believe that, as explained above, there is good cause to harmonize the construction and substantial service deadlines for those licenses that comprise the A Block of LMDS spectrum in the New York BTA. Accordingly, we will grant IDT Spectrum a limited waiver of Section 1.946 of the Commission's Rules on our own motion<sup>122</sup> to extend, until October 6, 2008, the deadline by which it must demonstrate substantial service for LMDS Station WPOI485. We find it both reasonable under the circumstances and in the public interest to extend the construction and substantial service deadline for LMDS Station WPOI485 from February 1, 2006 to October 6, 2008. Failure by IDT Spectrum to demonstrate that Station WPOI485 is providing substantial service within its licensed area prior to October 6, 2008 will result in the automatic termination of the license.

#### IV. CONCLUSION AND ORDERING CLAUSES

25. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 101.1011(a) of the Commission's Rules, 47 C.F.R. § 101.1011(a), that the request for finding of substantial service made by SpeedUSNY.com, L.P. on March 7, 2007, File No. 0002939453, IS DENIED.

26. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.3, 1.925, and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, that the Contingent Request for Waiver of Section 101.1011 of the Commission's Rules or, in the Alternative, Extension of Time to Construct, File No. 0002968483, filed by SpeedUSNY.com, L.P. on March 27, 2007 IS GRANTED to the extent indicated and is otherwise DENIED, and the time for SpeedUSNY.com, L.P. to demonstrate substantial service for the Station WLT379 IS EXTENDED until October 6, 2008.

27. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, that the informal request for Commission action filed by M2Z Networks, Inc. (M2Z) on April 9, 2007 with respect to Station WLT379 is GRANTED to the extent indicated and is otherwise DENIED.

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<sup>121</sup> See *Central Television, Inc. and WTVV, Inc. v FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987); Peninsula Communications, Inc., *Memorandum Opinion and Order and Order to Show Cause*, 16 FCC Rcd 11364, 11368-9 ¶ 11 (2001); Applications of WinStar Wireless, Inc. for Licenses to Operate Point-to-Point Microwave Facilities in the 38.6-40.0 GHz Frequency Band at Various Locations throughout the United States, *Memorandum Opinion and Order*, 14 FCC Rcd. 20533 (2001); R F Data, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 22410, 22411 ¶ 5 (WTB PSPWD 2001); Application of Electronic Radio Services, Inc., *Order on Reconsideration*, 17 FCC Rcd 16104 (WTB PSPWD 2001).

<sup>122</sup> The Commission may waive any provision of its rules on its own motion and for good cause shown. See 47 C.F.R. § 1.3. A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

28. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed on March 2, 2007 by IDT Spectrum, LLC IS DISMISSED.

29. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, that the time for IDT Spectrum, LLC to demonstrate substantial service for the Station WPOI485 IS EXTENDED until October 6, 2008.

30. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Fred B. Campbell, Jr.  
Chief, Wireless Telecommunications Bureau